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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 978

HENRIETTA BRODY, doing business as ALBERT FRENCH RESTAURANT,

Petitioner,

against

MARTIN C. EPSTEIN, Chairman of the New York State Liquor Authority, and the NEW YORK STATE LIQUOR AUTHORITY,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

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Opinions Below

The New York Appellate Division, First Department, on December 6, 1962 confirmed the determination of the New York State Liquor Authority *suspending* petitioner's restaurant liquor license for a ten-day period. This confirmation, without opinion, is reported in 18 A. D. 2d 619 (not otherwise reported). The New York Court of Appeals affirmed the confirmation order of the Appellate Division, also without opinion, on November 21, 1963. Reported, 13 N. Y. 2d 1038, 245 N.Y.S. 2d 605, 195 N. E. 2d 313. The Court of Appeals denied a motion for reargument, but granted the motion to amend the remittitur on January 9,

1964 (Pet. Br., p. 2). Reported, 13 N. Y. 2d 1119, 247 N.Y.S. 2d 118, 196 N. E. 2d 552. Judge Van Voorhis of the Court of Appeals concurred in the affirmance of the order but dissented from the amendment of the remittitur, pointing out that alleged constitutional question was not raised in the petition by which the judicial review was commenced.

Jurisdiction

Petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. § 1257(3).

Question Sought to Be Presented

Does the fact that a four-month interval occurred after receipt of a letter-complaint from a member of the public before the State Liquor Authority served charges upon a licensee in a disciplinary proceeding alleging a violation of law (Alcoholic Beverage Control Law, Consol. Laws, ch. 3-B, § 65, subd. 1, sale of liquor to minors) constitute a denial *per se* of due process under the Fourteenth Amendment? Is such a question available for review when it had not been presented in petitioner's state court petition for review of the administrative agency's action nor raised at all by petitioner before such agency, by way of defense or otherwise?

Statement

(1)

Petitioner is a restaurant licensee. The Liquor Authority received a complaint by letter on September 22, 1961 from the mother of a girl under the age of eighteen years that her daughter and others had been illegally served the liquor.

After consideration of the letter, on January 29, 1962 the Authority served charges upon petitioner alleging that

she, as licensee, had violated § 65 of the Alcoholic Beverage Control Law in that she sold, delivered or gave away or permitted to be sold, delivered or given away alcoholic beverages to minors actually or apparently, under the age of eighteen years on September 16, 1961.

On February 8, 1962 petitioner served her demand for a bill of particulars in which she requested, among other things, the names, addresses and the dates of birth of the minors so served. *On the same day* respondents responded to this demand and furnished the information requested.

The statement in petitioner's brief that she was "effectively deprived of any opportunity to adequately investigate the facts or to obtain witnesses" (p. 3) is not supported by a scintilla of such proof in the record. Petitioner had an unhampered opportunity to defend.

Several months elapsed between the date of the service of charges and the completion of the hearing. The original hearing date was deferred at the request of petitioner and several continuances were also granted at her request and petitioner was allowed to produce additional testimony (178-188). Hearings were held on April 12, April 26 and May 10, 1962. No further continuance of the hearing was sought by petitioner, who not only did not testify at the hearing but also was conspicuous by her absence from the hearing so that she would not perchance be called to testify.

After the completion of such hearings, the hearing commissioner prepared for the consideration of the Authority a summary of the proceeding before him and a statement of his findings in which he recommended that the charge be sustained.

Thereafter, on August 22, 1962 the Authority, after consideration of the stenographic transcript of the hearings, the exhibits in evidence and the summary and findings of the hearing commissioner, adopted such findings and ordered that petitioner's restaurant liquor license be suspended for a period of twenty-five days only ten of

which were to take effect and fifteen of which were to be deferred subject to being put into effect in the event the Authority found subsequently that the licensee had not taken practical precautions to assure the proper conduct of the licensed premises for a period of twelve months).

(2)

Neither in her petition to the state Supreme Court nor in the administrative proceeding did petitioner allege or raise the due process question now sought to be presented.

The record is devoid of any proof that the time lapse between the date of receipt of the letter-complaint and the service of the charges was unreasonable or improperly motivated or violated any statute or administrative rule or regulation.

The Alcoholic Beverage Control Law § 118 (App. "A", p. 7), authorizes respondents in license disciplinary proceedings to include "causes or violations occurring during the license period immediately preceding the issuance of such license or permit." The violation here occurred during the *existing* license period. This New York statute does not require that the facts or conduct which may justify license disciplinary action be called to the attention of the licensee prior to service of charges.

No suggestion is made by petitioner that her discipline was barred by any statute of limitations or by any other statute.

The Lack of Any Substantial Basis in the Case

The contention that respondents were under a duty to notify petitioner *immediately* when they received the letter-complaint from the mother of one of the adolescents illegally served with liquor is untenable. Respondents were entitled to a reasonable period for the evaluation of the

letter-complaint and the necessary investigation to determine its verity before charges were served upon the licensee.

No responsible administrative body would serve charges or expose the fact of the complaint simply upon the basis of a letter-complaint without more. The New York courts have in prior instances, as in the present case, rejected the wholly untenable claim of petitioner. *Matter of West 151st St. Liquor Store Inc.* v. *State Liquor Authority*, 13 A. D. 2d 731, 214 N.Y.S. 2d 604 (1961), aff'd 11 N. Y. 2d 678, 225 N.Y.S. 2d 754, 180 N. E. 2d 909 (1962). See also *Matter of Colonial Liquor Distributors* v. *O'Connell*, 295 N. Y. 129, 65 N. E. 2d 745 (1946). Within the period of any statutory limitation, the determination of whether or when to serve charges rests in the sound discretion of the administrative officials. *NLRB* v. *Indiana & Michigan Electric Co.*, 318 U. S. 9, 87 L. Ed. 579 (1943).

Reference by petitioner to the rules applicable in criminal cases, which are not applicable to civil actions even in the federal courts, *Hannah* v. *Larche*, 363 U. S. 420, 440, fn. 16 (1960), is not helpful to her contention. Apart from the fact that it is baseless here to contend that a delay of four months in the service of charges was "a deprivation of the individual's right to interpose a defense" (Pet. Br. p. 6), it is well established that the right to a speedy trial in criminal cases does not arise until after a prosecution is commenced.

Any delay occurring between commission of the offense and commencement of the prosecution is controlled by the applicable statute of limitations. *Parker* v. *United States*, 252 F. 2d 681 (6th Cir., 1958), cert. den. 356 U. S. 964 (1958); *Hoopengarner* v. *United States*, 270 F. 2d 465 (6th Cir., 1959); *United States* v. *Abrams*, 29 F.R.D. 178 (S.D.N.Y. 1961).

The period of four months between the date of the letter-complaint and the service of charges is less than the period

of six months for the service of a complaint by the NLRB stipulated in 29 U.S.C. § 160(b), discussed in *Local Lodge No. 1424* v. *N.L.R.B.*, 362 U. S. 411, 4 L. Ed. 2d 832 (1960). No question is raised here that the New York *statute* is invalid by reason of its limitations provision or by reason of its failure to include a provision mandating action upon all complaints within a specified period less than the annual license period.

In any event, it is plainly frivolous to contend that a time lag of four months was so offensive as to justify *per se* the raising of a due process question. The petitioner here was fully accorded due process in connection with the charge resulting in the short suspension of her license. See *Cella* v. *United States*, 208 F. 2d 783, 789 (7th Cir., 1953), cert. den. 347 U. S. 1016, 98 L. Ed. 1138 (1954). *Schwebel* v. *Orrick*, 153 F. Supp. 701 (D.D.C. 1957), aff'd per curiam, 251 F. 2d 919 (D. C. Cir. 1958), cert. den. 356 U. S. 927 (1958).

CONCLUSION

No substantial federal question exists. The petition for a writ of certiorari should be denied.

Dated, New York, April 30, 1964.

Respectfully submitted,

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Appendix A.

ALCOHOLIC BEVERAGE CONTROL LAW

§ 118. Revocation of licenses for cause

Any license or permit issued pursuant to this chapter may be revoked, cancelled or suspended for cause, and must be revoked for the following cause:

1. Conviction of the licensee, permittee or his agent or employee for selling any illegal alcoholic beverages on the premises licensed.

2. For transferring, assigning or hypothecating a license or permit.

Notwithstanding the issuance of a license or permit by way of renewal, the liquor authority may revoke, cancel or suspend such license or permit, as prescribed by this section and section one hundred nineteen of this chapter, for causes or violations occurring during the license period immediately preceding the issuance of such license or permit, and may recover, as provided in section one hundred twelve of this chapter, the penal sum of the bond on file during said period.